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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-106985-001 DT 08/09/2016

JUDGE M. SCOTT MCCOY

CLERK OF THE COURT
L. Mitchell
Deputy

STATE OF ARIZONA

RYAN PATRICK GREEN
BRADLEY LEWIS MILLER

v.

BOBBY RAYDEAN HOOVER (001)

ERIC W KESSLER
SANDRA K HAMILTON

CAPITAL CASE MANAGER

RULING

Defendant's two motions to suppress, both filed May 2, 2016, are at issue. Following an evidentiary hearing on May 13, 2016 and June 17, 2016, and after the parties submitted written closing arguments, the Court took these matters under advisement.

For the reasons below, the Court will deny both motions.

I. Background

The State has charged Defendant with a number of felonies, including First Degree Felony Murder and several counts of Misconduct Involving Weapons, in connection with the shooting death in this case.

Defendant's Motion to Suppress Defendant's Statements seeks exclusion of all pre-*Miranda* statements Defendant made to police contemporaneous with his arrest. Defendant's Motion to Suppress re Backpack Evidence seeks to exclude evidence that, when arrested, Defendant had a disassembled, sawed-off shotgun in his backpack.

II. Evidence Presented

On February 11, 2013, Officer Chase Ditweiler of Phoenix Police Department responded at approximately 12:20 p.m. to a radio report of shots fired at an apartment complex at 3421

West Dunlap. Police radio also notified officers en route that a man had been shot and a second man had been seen leaving the scene with a gun.

Traveling westbound on Dunlap and within minutes, Ditweiler observed an "amped up" man (later identified as Defendant Bobby Hoover) fitting the physical description of the person seen leaving the shooting. Defendant was walking briskly eastbound on Dunlap a few blocks from the site of the shooting. He appeared to Ditweiler nervous and shaken up. Defendant wore a backpack on his back supported by a strap over each shoulder. He looked at Ditweiler and then immediately looked down.

Ditweiler executed a U-turn, pulled up behind Defendant and ordered Defendant to stop. Defendant stopped near a gated entrance of Cortez High School, raised his hands and said, "I have three guns on me," before Ditweiler reached Defendant or asked him any questions. Though the gate was closed, February 11th was a school day, and Ditweiler observed people walking around on campus.

As Ditweiler was handcuffing Defendant, Officer Michelle Klimczak (nka Syrek) arrived and assisted. During that process, Defendant was cooperative. Syrek asked Defendant if he had any weapons or anything sharp that might hurt the officers. Defendant replied that he had two handguns in his pockets. Syrek patted down Defendant and felt hard, large objects in his front pants pockets. She removed a handgun from each pocket.

With Defendant's hands cuffed behind his back, Syrek continued the pat down. Syrek asked Defendant if he had any other weapons. Defendant admitted he had a shotgun in his backpack, which by now had been removed and placed on the ground where Defendant could not reach it. Syrek asked: "What kind of shotgun could fit in a backpack?" Defendant stated that the barrel of the shotgun had been shortened.

While being cuffed and patted down, Defendant also stated that: 1) he had an outstanding arrest warrant; 2) he possessed methamphetamine; and 3) he had shot someone who he claimed had accosted him. All of the above activity occurred within five minutes of the original report of shots fired.

At some point after officers had handcuffed Defendant, Syrek unzipped several zippers of Defendant's backpack and visually confirmed that it contained a disassembled shotgun with a shortened barrel. Syrek searched for and confirmed that an outstanding arrest warrant for Defendant existed. She then placed the still-handcuffed Defendant in the back of Syrek's car.

While other officers investigated the shooting scene, Defendant remained in the back of Syrek's auto and was not questioned. At approximately 12:50 p.m., Syrek read Defendant his *Miranda* rights.

Police ultimately arrested Defendant and conducted a homicide investigation. They impounded his backpack and searched it pursuant to search warrant (Exhibit 7) later the same day.

III. *Miranda* Analysis – The Public Safety Exception

"*Miranda* requires the police to give [the now-familiar] *Miranda* warnings to a person in custody before interrogating him." *State v. Ramirez*, 178 Ariz. 116, 123, 871 P.2d 237, 244 (1994) (citations omitted). The State acknowledges that Defendant's custodial statements above occurred before *Miranda* warnings, but argues that they are admissible under the public safety exception to *Miranda*.

Under that exception, *"Miranda* [is not] applied . . . to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." *State v. Ramirez*, 178 Ariz. 116, 123, 871 P.2d 237, 244 (1994), *quoting* *New York v. Quarles*, 467 U.S. 649, 656 (1984) (internal quotations omitted). Put another way, *Miranda* applies to those "questions designed . . . to elicit testimonial evidence from a suspect," *Ramirez*, 178 Ariz. at 123, 871 P.2d at 244, **not** to "questions necessary to secure [the police's] own safety or the safety of the public." *Id*. (holding questions in confusing circumstances: "What is going on?" and "Who else was inside?" and "Is anybody else was hurt?" did not violate *Miranda*.)

Public safety questions occur when, considering the nature and context, there was an objectively reasonable need to protect the police or the public from any immediate danger." *State v. Leteve*, 237 Ariz. 516, 354 P.3d 393, 399 (2015) (citations omitted), *cert. denied*, ____ U.S. _____ (2016). *See also In re Roy L.*, 197 Ariz. 441, ¶¶ 13-15, 4 P.3d 984 (App. 2000) (holding questions to juvenile believed to be possessing firearm across street from public school, "Do you have a gun?" and "Is this the gun?" within public safety exception).

Here, police encountered a very fluid and dangerous situation. Within a matter of minutes, Ditweiler, Syrek, or both:

- Responded to a report of shots fired.
- Learned someone had been shot and that an armed subject left the scene.
- Observed Defendant, who matched the physical description of the armed subject, walking away from the shooting scene, acting suspiciously.
- Stopped and detained Defendant.
- Patted down Defendant, removed his backpack and handcuffed him near a (then closed) gate at the front of a high school, during the noon hour, on a school day.

The Court finds that, given their nature and context, all of the questions Syrek asked of Defendant occurred when "there was an objectively reasonable need to protect the police or the public from any immediate danger." *Id*. And the court finds that the last question, "What kind of shotgun could fit in a backpack?" sought to clarify Defendant's seemingly nonsensical statement that he had a shotgun in his backpack, not "to elicit testimonial evidence from a suspect." *Ramirez*, 178 Ariz. at 123, 871 P.2d at 244. Accordingly, each of Defendant's pre-*Miranda* statements is admissible.

IT IS THEREFORE ORDERED denying Defendant's Motion to Suppress Defendant's Statements.

IV. Fourth Amendment Analysis – Defendant's Backpack

The State acknowledges that Ditweiler conducted a brief, but warrantless, search of Defendant's backpack after Defendant had been cuffed and could not possibly gain access to the backpack. The State's brief argues that the search was permissible under a number of different theories, all of which Defendant disputes, most of which the Court's ruling below elides.

Because even if Ditweiler's backpack search was impermissible, in the circumstances the Court finds the shotgun would have been discovered inevitably, either: i) through a routine inventory search; or ii) by police executing the search warrant they actually obtained.

Under the inevitable discovery exception to the exclusionary rule, illegally obtained evidence is nonetheless admissible if the government can establish by a preponderance of the evidence that the evidence, "inevitably would have been seized by lawful means." *Brown v. McClennen*, 239 Ariz. 521, ¶ 14, 373 P.3d 538 (2016) (citations omitted). "The exception does not turn on whether the evidence would have been discovered had the deputy acted lawfully in the first place. Rather, [it] applies if the evidence would have been lawfully discovered despite the unlawful behavior and independent of it." *Id*. (internal citations omitted). Here, discovery of the shotgun was inevitable.

First, given the arrest warrant in evidence (Exh. 13), Defendant's immediate arrest was inevitable. An inventory search of the backpack he was wearing when arrested – and discovery of the impermissible shotgun – was likewise inevitable. *See Exh.* 8A.

Second, and also independent of any arguable wrongdoing, police unquestionably would have included the backpack in the search warrant they obtained (Exh. 7). Such was inevitable even without any idea what was in the backpack, given that Defendant:

- Was wearing the backpack at issue when arrested.
- Within minutes and mere blocks from the shooting.
- Possessed two guns and methamphetamine in his pants when arrested.
- Admitted shooting the victim.

Finally, the search warrant itself makes only three, relatively benign, references to the backpack containing a "modified shotgun." Exh. 7, at 000974, 000975, 000980. Even with those references excised, the search warrant contains a wealth of facts establishing probable cause to search the backpack.[1]

For the foregoing reasons.

IT IS ORDERED denying the Motion to Suppress re Backpack Evidence.

[1] Even if Syrek's final question to Defendant ("[w]hat kind of shotgun could fit in a backpack?") violated *Miranda*, the search warrant, as excised, is not thereby tainted.